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Supreme Court of the United States,

October Term, 189

No. 380

PETER DOUGHERTY,

Plaintiff in Error,

vs.

THE NEVADA BANK OF SAN FRANCISCO

(A CORPORATION),

Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

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In the Supreme Court of the United States

PETER DOUGHERTY,
Plaintiff in Error,

vs.

THE NEVADA BANK OF SAN FRANCISCO,
(a corporation)
Defendant in Error.

Brief of Defendant in Error.

STATEMENT.

This writ was brought to reverse a judgment of the Supreme Court of California, affirming a judgment against the plaintiff, plaintiff in error here, in a suit to foreclose an assessment on a lot of the defendant, defendant in error here, levied to pay for street work in San Francisco under a contract made pursuant to the act of April 1, 1872. The contract was made January 15, 1873, and required the completion of the work in 150 days from that date, which time was subsequently extended for forty days by admittedly valid orders of the Board of Supervisors, and expired on July 24, 1873. *Nearly two years afterwards, on March 29, 1875, a further extension of 645 days, dating from such prior expiration of the time, was granted by the Board*, and there were numerous *like extensions afterwards, before the work was done, granted, in almost every instance, after the time previously allowed had expired.* The assessment was made April 11, 1877, shortly after the work was completed. One Charity Hayward, then owner of the defendant's lot, appealed from said assessment to the Board of Supervisors on the ground, among others, of the alleged invalidity of the aforesaid extensions, granted after expiration of the time, and on such appeal the Board confirmed the assessment. The judgment here in question held: (1st) that the extensions above-mentioned were unauthorized and invalid, and that the assessment was void for failure to perform the work in

time; and (2d) that the decision of the Board on said appeal of Charity Hayward did not conclude or estop the defendant on this point:

Trans. fols. 1 *et seq.*, 17 *et seq.*, 20 *et seq.*, 25-27-29, *et seq.*, 27 *et seq.*, 49 *et seq.*

The plaintiff in error contends that the judgment, as to the first point above mentioned, impaired the obligation of his contract, which, as he alleges, was made and performed on the faith of *Taylor* vs. *Palmer*, 31 Cal., 246, decided under the acts of 1862 and 1863, which, as he claims, were the same, in this respect, as the act of 1872, and that said judgment, as to the second point, denied him "the equal protection of the laws." The brief of plaintiff in error states the remaining facts, and the material provisions of the acts of 1862 and 1863 and of the act of 1872, with one exception.

Brief of Plaintiff in Error, pp. 2–5, 8 *et seq.*, 10, 13, 18 *et seq.*

The brief, however, omits certain very material provisions of Sec. 6 of the act of 1872. That section prescribes the mode of awarding a contract for street work, and then provides:

"Notice of such award shall be published for three days (Sun-
"days and non-judicial days excepted), and within five days after
"the first publication of said award the owners of a majority of the
"frontage of lots and lands liable to be assessed for said work, or
"or their agents * * * may elect to do the said work, and
"enter into a written contract to do the whole work at the price for
"which the same is awarded, * * * and they shall commence
"said work within fifteen days from the first publication last above
"mentioned, and shall prosecute it diligently and continuously,
"and *complete it within the time limited in the contract, or within*
"*any extended time*; but should the said contractor, or the property
"owners, fail to prosecute the same diligently or continuously in
"the judgment of said Superintendent of Public Streets, Highways
"and Squares, or [to] *complete it within the time prescribed in the*
"*contract, or within such extended time, then it shall be the duty of said*
"*Superintendent* of Public Streets, Highways and Squares *to report*
"*the same to the Board of Supervisors, who shall, without further peti-*
"*tion on behalf of the property owners, order the clerk of the Board of*
"*Supervisors to advertise for bids, as in the first instance, and relet the*
"*contract in the manner herein before provided.*" The remaining provisions of that section have no bearing whatever on any question presented in this case.

Statutes of California of 1871–2, pp. 804, 807.

The acts of 1862 and 1863, under which *Taylor* vs. *Palmer*, 31 Cal., 246, was decided, contained no such provisions.

Points, Authorities and Argument.

I. This Court has no Jurisdiction of the Cause.

1. Decision as to extensions above mentioned involves no "federal question."

The case of *Wood* vs. *Brady*, 150 U. S., 18, 22, 23, is absolutely decisive on this point, the judgment there sought to be reversed involving the validity of *precisely similar extensions under the same statute*, to those here in question. The Supreme Court of California, in that case as in this, held such *ex post facto* extensions of the time of performance of street contracts to be absolutely unauthorized and void under the act of 1872. This doctrine does not overrule *Taylor* vs *Palmer*, 31 Cal., 246, as claimed by the plaintiff in error here, but, as is clearly explained in *Beveridge* vs. *Livingstone*, 54 Cal., 54, the leading case on this subject, rests upon the ground that the provisions of Section 6 of the act of 1872, quoted *supra*, expressly and peremptorily make it "the duty" of the Street Superintendent, where a street contractor fails to perform his contract within the time prescribed therein, "or within any extended time," to report his delinquency to the Supervisors, and required the latter, upon receiving such report, to "relet the contract," thus precluding the possibility of any extension of time upon the original contract after it has once expired, and *Taylor* vs. *Palmer* is distinguished as having been decided under *statutes containing no such provisions*. For sixteen years the doctrine thus laid down as to the construction of the act of 1872 on this point, has been followed without deviation, doubt or question, and has become the "settled law" in that Court.

Beveridge vs. *Livingstone*, 54 Cal., 54;
Fanning vs. *Schammel*, 68 Id., 428;
Owens vs. *Heydenfeldt*, 6 West Coast Rep., 149;
Torrens vs. *Townsend*, Id.;
Dougherty vs. *Coffin*, 69 Cal., 454;
Raisch vs. *San Francisco*, 80 Id., 1;
Dougherty vs. *Nevada Bank*, 81 Id., 162;
Brady vs. *Burke*, 90 Id., 1.

As was held in *Wood* vs. *Brady*, 150 U. S. 18, 22-23, this whole question is purely and simply a question of the construction of a State statute by a State Court, and as to such matters it is the settled rule, and has been the immemorial practice of this Court to accept the decisions of the State Courts as controlling. And aside from that, the extensions of time in question, being, under the act of 1872, mere matters of discretion, grace and favor on the part of the Supervisors, cannot possibly be deemed to enter into the "obligation of contracts" under that act. On both these grounds it was directly held in *Wood* vs. *Brady*, *supra*, that the validity or invalidity of such extensions is not a "federal question" cognizable here. That was a suit to quiet the title to certain lots in San Francisco

claimed by the defendants, plaintiffs in error here, as purchasers under decrees of foreclosure of assessments under said act of 1872, based upon contracts *the time of performance of which had been extended after its expiration.* The plaintiffs in error sought to reverse the judgment holding these extensions invalid, as impairing the obligation of their contracts, claimed as here to have been made and performed on the faith of *Taylor* vs. *Palmer, supra.* Mr. Justice Brown delivering the opinion of this Court, after stating, among other things, the material provisions of the acts of 1862 and 1863 and of the act of 1872 and the substance of the decisions in *Taylor* vs. *Palmer*, and *Beveridge* vs. *Livingstone, supra*, said:

"Plaintiffs in error now contend that the construction given by " the Supreme Court in *Taylor* vs. *Palmer*, in favor of the validity of " such extensions, was one upon which Diggins(the contractor)was en- " titled to rely, and constituted a part of his contract, the obligation " of which could not be impaired by a different construction subse- " quently given. But assuming for the purposes of this case that " there may be a vested right under an erroneous decision, it is " carrying the doctrine to an unwarrantable extent to say that the " construction placed by the Court upon one statute implies an " obligation on its part to put the same construction upon a differ- " ent statute, though the language of the two may be similar.

" The argument that the language being similar, a like con- " struction should be put upon both acts, is one properly addressed " to the State Court; but *when that Court has assumed to distinguish* " *between the two acts, it is not within our province to say that the dis-* " *tinction is not well taken.* The acts in this case, though similar, " are not identical, and there is certainly some ground for saying " that the construction of the two should not be the same. The " point made by the plaintiffs in error, that the decision in *Bever-* " *idge* vs. *Livingstone* was made retroactive, is answered by the fact " that Courts are bound in their very nature to declare what the " law is and has been, and not what it shall be in the future, and " that if they were absolutely bound by their prior decisions, they " would be without the power to correct their own errors.

" But even if it were conceded that defendants had a right " to rely upon the Supreme Court giving to the act of 1872 the " same construction it had placed upon the act of 1863, that " construction was nothing more than that the Board of Super- " visors had a discretion to extend the time for the performance of " the contract after the time originally limited had expired. It is " evident that this was no part of defendants' contracts. Their " contracts were to do certain work within a certain time, and *the* " *fact that there was a discretion on the part of the Board of Supervis-* " *ors to extend such time did not enter into or form a part of the con-* " *tract. It was a discretion which the Board of Supervisors might* " *or might not exercise.* If the contractor had violated his contract, " he had no legal right to such extension, and took his chances of " obtaining it. *In other words, there was no possible contract the obli-*

"*gation of which could be impaired by a ruling that the Board of* "*Supervisors had no power to grant such extension.*" Then, after discussing another point, not presented here, the learned jurist concluded thus: "*In no aspect does the case present a federal question,* "*and the writ is, therefore, dismissed.*"

That judgment was indubitably right and, even if the Court were disposed to reconsider the question here, no other conclusion would be possible. The reasons given by Mr. Justice Brown for holding the decision of the State Court to be controlling here on that point are unanswerable, even assuming such decision to have been wrong. But it was *not* wrong. Extensions of time upon street contracts *after it has expired* cannot possibly be held valid under the provisions of section 6 of the act of 1872, quoted *supra*. Under the explicit and mandatory requirements of that section that, upon a failure to perform such a contract within the time limited therein or some extension of it, such failure is to be reported and the contract "re-let," it is clear that when the time upon such contract has once expired and *ceased to run* the contract is, as stated in *Dougherty* vs. *Coffin*, 69 Cal. 454, a "*dead contract*," and cannot be revivified by any *post mortem* extension of its term of existence. If this is not the meaning and effect of those requirements they are utterly senseless and nugatory. It is impossible to hold that the time of performance of a street contract may be extended *after it has expired*, if the work is unfinished, when the statute peremptorily declares that, in such a case, the Supervisors "*shall* * * * *re-let* "*the contract.*" There are other provisions of the statute equally inconsistent with such a holding. Take, for example, the provisions of section 7 requiring the recording of a certificate of every extension of time upon such a contract, specifying "*the date*" of such extension and "*the date of indorsement*" thereof on the contract, and the like. If, as the plaintiff in error claims, the time of performance is not of the essence of such contracts, and an extension thereof may be granted at any time before or after its expiration, *the dates* of such extension and its indorsement on the contract are obviously immaterial, and the foregoing requirements are senseless verbiage. But it is elementary law that, in construing a statute, *every word* of such statute must, if possible, be given *some meaning and effect*.

The fact that the acts of 1862 and 1863, under which *Taylor* vs. *Palmer* was decided, contain no provisions like those above-mentioned distinguishes that case *toto cœlo* from those arising under the act of 1872. And the decision in that case could not, in any possible way, enter into the obligation of the plaintiff's contract under the latter act, so as to raise any "federal question" here.

But even if *Taylor* vs. *Palmer* had been decided under a statute *exactly like that of 1872*, and could, for this or any other reason, be deemed to form part of the plaintiff's contract, there would still be no "federal question" upon which this Court could take jurisdiction here. It is settled law, as decided in a comparatively recent case upon a writ of error brought to reverse a judgment of a State

Supreme Court as impairing the obligation of a contract giving the plaintiff in error, a domestic corporation, an exclusive franchise to supply a certain borough and its inhabitants with water for a term of years, that this Court has no jurisdiction to review such a judgment on that ground: First—*Where the statute impeached as impairing the obligation of the contract in question was enacted prior to the making of the contract;* or Second—"Unless that judgment "gives effect to *some provision of the State constitution or some legisla-* "*tive enactment of the State which is alleged by the unsuccessful party* "*to impair the obligation of the particular contract* in question."

Lehigh etc. Co. vs. *Easton*, 121 U. S., 388, 391, citing to the latter point:
Railroad Co. vs. *Rock*, 4 Wall., 177;
Railroad Co. vs *McClure*, 10 Id., 511, 515;
Knox vs. *Exchange Bank*, 12 Id., 379, 383;
Delmas vs. *Insurance Co.*, 14 Id., 661, 665;
University vs. *People*, 99 U. S., 309, 319;
Chicago etc. Co. vs. *Needles*, 113 Id., 574, 582.

This doctrine is directly applicable here. There is no pretense that the judgment sought to be reversed gave effect to any constitutional provision or "legislative enactment of the State" alleged to impair the obligation of the plaintiff's contract. *It is the judgment alone which is alleged to have that effect.* The only statute involved in this controversy is the act of 1872, which was in force prior to the contract and under which such contract was made. Certainly the plaintiff in error does not claim that his contract was in any way injuriously affected by that act. And even if it were so it would give no foundation for the jurisdiction of this Court, under the doctrine of *Lehigh etc. Co.* vs. *Easton*, *supra*.

None of the authorities cited for the plaintiff in error hold any doctrine adverse to any of the foregoing contentions. In none of those cases was anything decided or even intimated contrary to what is laid down in *Wood* vs. *Brady* and *Lehigh etc. Co.* vs. *Easton*, *supra*. In none of them is there even a *dictum* that this Court will interfere to review a judgment of a State Court as impairing the obligation of a contract, by giving a different construction to the State statute under which such contract was made, from that placed upon a prior statute on the same subject *containing different provisions*, or where it is alleged that the judgment *alone* impairs the obligation of the contract, not that it gives effect to a constitutional provision or statute of the State *posterior to the cont act*, whereby it is thus injuriously affected.

The numerous cases cited by the plaintiff in error to the points that, under the act of 1872, property owners are restricted to the defenses mentioned in Sec. 13 in contesting an assessment, that such property owners are not parties to contracts for street work, that time is not of the essence of the exercise of authority affecting the public, etc., are all answered by the decision in *Wood* vs. *Brady*,

supra. Those questions all relate to the construction of a State statute, as to which the decisions of the State Court are controlling, as laid down in that case.

2. No "federal question" involved in the determination by said judgment that the decision on the appeal to the Supervisors did not conclude or estop the defendant.

The second contention of the plaintiff in error that the judgment in question, holding the defendant not to be concluded or estopped by the decision of the Supervisors on the appeal of Charity Hayward, impaired the obligation of the contract of the plaintiff and denied to him "the equal protection of the laws," is also answered by the principle laid down in *Wood* vs. *Brady*, 150 U. S. 18, 22, 23. The State Supreme Court, on this point also, simply followed its previous decisions. It is an established doctrine of that Court that the appeal to Board of Supervisors provided for in the act of 1872 and kindred statutes, is *a remedy for errors and irregularities only* in these street assessment cases, and *not for jurisdictional and other incurable defects*, and that a decision on such an appeal does not conclude or estop even the parties or their privies with respect to defects of the latter kind.

Dougherty vs. *Hitchcock*, 35 Cal., 512, 524;
Mahoney vs. *Braverman*, 54 Id., 570.
Dougherty vs. *Coffin*, 69 Id., 454, 455.
Dougherty vs. *Nevada Bank*, 81 Id., 162;

The granting of the invalid extensions here in question, and the failure to complete the work in time, were held, in *Dougherty* vs. *Coffin*, 69 Cal., 454, 455, and in the case at bar, to be among those not concluded or estopped by a decision of the Board upon such an appeal. This was purely a question upon the construction of the statute, and the decisions of the State Court upon that point, even if erroneous, are binding here and present no "federal question," under the doctrine of *Wood* vs. *Brady*, *supra*. In a still more recent case in this Court it was decided that where a State statute provides a special tribunal to which an "aggrieved" tax-payer may apply for relief against an erroneous or invalid tax or assessment, it is for the Supreme Court of that State to determine whether the remedy so provided is exclusive or otherwise, and a ruling of that Court upon that point, whether right or wrong, raises no "federal question" cognizable here.

Northern, etc., R. R. Co. vs. *Patterson*, 154 U. S., 130, 133, 134.

The same rule obviously applies where, as here, the question is as to the conclusiveness of a decision of such a special statutory tribunal. The plaintiff in error claims, however, that even if the decision of the Board here was not in itself conclusive, yet the defendant's grantor having appealed to that tribunal and thus assented to its jurisdiction with respect to the validity of the extensions in question, she and her grantee are estopped to deny the

conclusiveness of the Board's judgment on that point. This contention, even if true, raises no "federal question" cognizable here. It simply presents a question in the common law of estoppel. If that were a "federal question," then every case of estoppel in the State Courts might be brought to this Court, if it involved a sufficient sum. In any case it is clear that the judgment of the State Court here did not, on this point, or any other, deprive the plaintiff in error of "the equal protection of the laws." A State judgment or statute, to be impeachable on that ground in this Court, must be shown to operate upon the aggrieved party *unequally and more harshly than upon other persons similarly situated.*

New York etc. R. R. Co. vs. *Bristol*, 151 U. S., 571;

Duncan vs. *Missouri*, 152 Id., 382.

There is no claim or pretense of any such unequal operation of the judgment here, assuming it to be erroneous in the particular now under discussion. But it was clearly right on this point, as on every other, and on this ground also did not deprive the plaintiff in error of "the equal," or any "protection of the laws." The decision of the Supervisors was certainly not conclusive against the defects here urged. Sec. 13 of the act expressly authorizes defenses against jurisdictional defects. And the defects here *were* jurisdictional. They went to the very foundation of the assessment. The extensions being void the contract was "dead" and the assessment was made without any contract. If the Board had no power to grant the extensions it certainly could not validate them afterwards by *saying* that they were valid. And if the decision of the Board on the appeal was not legally conclusive as to those extensions, obviously no estoppel on that point could arise from taking the appeal. The taking of such appeal was no assertion of the conclusiveness of the decision thereon, if the statute did not, authorize an appeal on that ground. And in any case the property-owner could not possibly estop himself or his grantees from contesting the validity of the extensions by appealing to the Board which granted them to declare them invalid. It would be a curious perversion of the principle of estoppel to hold a party estopped from contesting the legality of a proceeding against him by continually protesting against it as illegal.

The authorities cited by the counsel for plaintiff in error to the point that a party voluntarily taking a benefit under an unconstitutional statute is, in certain cases, estopped to deny its constitutionality afterwards, and the like, have no application here. The defendant's grantor was not a voluntary party to the assessment, and her appeal was taken, not to obtain a benefit under the statute but to escape an illegal burden sought to be imposed under it. Furthermore there is no intimation in any of the cases cited that *any "federal question" was involved in the principle of estoppel there decided.*

We respectfully submit that the writ of error in this case must be dismissed.

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